Macotta Corporation *and* Millmen's Local 1452, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 7-CA-18838(E)

26 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND HUNTER

On 14 February 1983 Administrative Law Judge Richard A. Scully issued the attached Supplemental Decision in this proceeding. Thereafter, Macotta Corporation filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

On 8 September 1982[1] the Board entered an Order adopting the Decision of the Administrative Law Judge recommending dismissal of the complaint in the underlying unfair labor practice proceeding.[2] On 7 October counsel for Macotta Corporation mailed an application for an award of attorneys fees pursuant to the Equal Access to Justice Act.[3]

The application, addressed to the Administrative Law Judge in Washington, D.C., was delivered to the Board's mailroom at 1717 Pennsylvania Avenue, N.W. The mailroom directed the application to the Division of Judges in Washington, D.C., where it was time-stamped at 3:44 p.m. on 8 October 1982. The application was then routed to the Administrative Law Judge, who received it on 12 October. He forwarded the application to the Executive Secretary of the Board on the same day.

The Equal Access to Justice Act contains a 30-day filing period which is a jurisdictional prerequisite and cannot be extended.[4] The Administrative Law Judge found that the earliest the application could be considered to have been filed with the Board was when it was received by the Executive Secretary on 12 October.[5] As this was more than 30 days after the final disposition of the underlying unfair labor practice proceeding on 8 September, the Administrative Law Judge found that the application was untimely,[6] and he accordingly recommended dismissing the application.

We have been administratively advised that all mail addressed to the administrative law judges in Washington, D.C., or to the Division of Judges in Washington, D.C., is delivered by the United States Postal Service to the Board's mailroom at 1717 Pennsylvania Avenue, N.W. This mail is stamped in the Board's mailroom and then directed to the Division of Judges.

In these circumstances, we find that the application was received at the Board's headquarters in Washington, D.C., by 8 October, where it was handled as other mail delivered to the Board's mailroom is handled. We find that when the application was received at the Board's headquarters in Washington, D.C., it was filed with the Board. The application in this case was therefore filed in a timely fashion. See *Hardwick Co.*, 266 NLRB No. 118 (Apr. 24, 1983).

Accordingly, we shall remand this proceeding to the Administrative Law Judge to take such action as is required by our finding that the application was timely filed.

ORDER

It is hereby ordered that this proceeding be, and it hereby is, remanded to Administrative Law Judge Richard A. Scully, who shall take such action as is required in light of our decision that the Applicant's application for an award of attorneys fees pursuant to the Equal Access to Justice Act was timely filed.

[1] All dates hereinafter refer to 1982, unless otherwise indicated.

[2] The Administrative Law Judge issued his Decision on 2 August. No party filed exceptions to his Decision.

[3] 5 U.S.C. § 504 (1982).

[4] *Monark Boat Co.*, 262 NLRB 994 (1982), enfd. 708 F.2d 1322 (8th Cir. 1983).

[5] The Administrative Law Judge found that neither receipt by the Division of Judges nor delivery to the Board's mailroom constituted filing with the Board.

[6] Citing *Monark Boat, supra.*

SUPPLEMENTAL DECISION AND ORDER

RICHARD A. SCULLY, Administrative Law Judge: This is a supplemental proceeding arising pursuant to the Equal Access to Justice Act (EAJA).[1] On August 2, 1982, I issued a decision recommending dismissal of the single remaining unfair labor practice allegation against the Respondent, Macotta Corporation, in what initially involved several complaints against both the Respondent and the Union.[2] No exceptions to the decision having been filed, on September 8, 1982, the Board, in accordance with the applicable provisions of the National Labor Relations Act, as amended, and its Rules and Regulations, entered an Order adopting that Decision and dismissing the complaint.

[1] 5 U.S.C. § 504 (1982)

[2] All of the other allegations had been disposed of through settlements.

On October 7, 1982, counsel for the Respondent mailed an application for an award of attorneys fees pursuant to the EAJA and associated documents, addressed to me, along with a covering letter stating, *inter alia*: "Please file the appropriate number of originals and copies of each document with your office . . . ." A time-stamp indicates that the application was received by the Division of Judges in Washington, D.C., at 3:44 p.m. on October 8, 1982. I received these documents on October 12, 1982, and forwarded them to the Executive Secretary of the Board on that date.

On October 25, 1982, the Board entered an Order referring the Respondent's application to me, pursuant to Section 102.148(b) of the Board's Rules and Regulations. That Order states that the Respondent had filed the application "with the Board in Washington, D.C., on October 8, 1982." Thereafter, counsel for the General Counsel filed a motion for reconsideration of that Order, seeking a finding that the Respondent's application was not filed with the Board until on or after October 12, 1982. The Respondent has filed an opposition to the General Counsel's motion for reconsideration and its own motion for filing *nunc pro tunc*. The General Counsel has filed an opposition to the Respondent's motion for filing *nunc pro tunc* and a motion to dismiss the Respondent's application on the grounds that it was not timely filed with the Board and that the General Counsel's position in the underlying unfair labor practice litigation was substantially justified. The Respondent has filed an opposition to this motion to dismiss. On December 13, 1982, the Board entered an Order referring the motion for reconsideration and the motion for filing *nunc pro tunc* to me. Accordingly, all outstanding motions relating to the Respondent's application are before me for disposition. In view of my finding that the Respondent's application should be dismissed as untimely filed, I have given no consideration to and have made no findings with respect to the substantive issues of whether the General Counsel's position in the underlying litigation was substantially justified or whether the Respondent should be awarded attorneys fees in the amount requested.

The General Counsel contends that receipt of the Respondent's application by the Division of Judges on October 8, 1982, did not constitute filing with the Board and that it was not actually filed until it was received by the Board after I sent it to the Executive Secretary of the Board on October 12, 1982. He contends that the application was not timely filed and must be dismissed.

The Respondent contends that its application was timely filed, no later than October 8, 1982, because it was received on that date by the Division of Judges which is part of the Board. It also contends that because its application was delivered to the Board's office in Washington, D.C., before it was forwarded to the Division of Judges, "the Board had the application in its possession on or prior to October 8, 1982."

Discussion and Conclusions

Section 504(a)(2) of the EAJA provides that an application for attorneys fees must be submitted to the appropriate agency "within thirty days of a final disposition in the adversary adjudication." The Board has held that, as a waiver of sovereign immunity, this statute must be strictly construed and that filing an application within the 30-day period is a jurisdictional prerequisite which cannot be extended.[3] It has also held that "filing" is accomplished when the Board receives the document to be filed and not when it is mailed.[4] In order to meet the jurisdictional requirement in this case, the Respondent's application had to be "filed" within 30 days of September 8, 1982, on or before October 8, 1982. The fact that it was mailed on October 7, 1982, is immaterial.

Section 102.148(a) of the Board's Rules and Regulations requires that an application for an award of attorneys fees be filed "with the Board in Washington, D.C." Section 102.148(b) provides that upon filing the application it shall be referred by the Board to the administrative law judge who heard the matter on which the application is based or, if there was none, to the chief administrative law judge for assignment. Section 102.149(a) provides that "after the time the case is referred by the Board to the administrative law judge until the issuance of the judge's decision" all motions and pleadings "shall be filed with the administrative law judge."

The Respondent's application was addressed to me, an administrative law judge in Washington, D.C.,[5] and the cover letter indicates that it was seeking to file the application with the administrative law judge rather than with the Board. The Board's regulations make a clear distinction between filing with the Board and filing with the administrative law judge and specifically provide that the initial application for an award under the EAJA must be filed with the Board. It is only after the Board has referred the matter to the administrative law judge that filing anything with the latter becomes appropriate. Consequently, receipt of the Respondent's application by the Division of Judges on October 8, 1982, did not constitute filing with the Board.

The remaining question is whether the fact that the Respondent's application may have passed through the mailroom of the Board's office in Washington, D.C., is sufficient to meet the filing requirements of the regulations. The Respondent argues that it is and that because of this the Board had the application in its possession on or prior to October 8, 1982. I do not agree.

The Respondent's application was addressed to me at "1375 K Street," the location of the Washington office of the Division of Judges. The correct mailing address is "1717 Pennsylvania Avenue," which is also the mailing and street address of the Board. Although the application was apparently delivered to 1717 Pennsylvania Avenue, there is no indication that it was opened or in any manner processed there. The application was forwarded to the Division of Judges office where it was opened, time-stamped, and routed to the administrative law judge to whom it was addressed. Filing is considered to occur when a document is delivered to an official who is au-

[3] *Monark Boat Co.*, 262 NLRB 994 (1982).

[4] *Ibid.*

[5] It seems clear that had the administrative law judge on this case been located at a Division of Judges office outside Washington, D.C., San Francisco, for example, there would be no doubt but that sending the application to him would not meet the requirements of Sec. 102.48(a) of the regulations. See *Lord Jim's*, 264 NLRB 1098 (1982).

thorized to receive it.[6] When delivered to the Board's mailroom, the Respondent's application was not delivered into the possession of the Executive Secretary of the Board or any other officer authorized to receive documents for filing; it was simply transmitted to the addressee. The earliest that this application could be considered to have been filed with the Board was when it was received by the Executive Secretary after I forwarded it to him on October 12, 1982.[7] This was more than 30 days after the final disposition in this matter. Consequently, the Respondent's application was untimely and must be dismissed.

There are no grounds for granting the Respondent's motion for filing *nunc pro tunc*. This is not a case where a document, which in the normal course would have been timely filed, was delayed due to circumstances over which the Respondent had no control. On the contrary, counsel for the Respondent waited until the 29th day before mailing its application and then did not even attempt to comply with the clearly stated filing requirements in the regulations.[8] The Respondent's motion for filing *nunc pro tunc* must be denied. Inasmuch as the portion of the Board's order of October 25, 1982, which recites that the Respondent's application was "filed with the Board in Washington, D.C., on October 8, 1982" is incorrect, the General Counsel's motion for reconsideration should be granted.

[Recommended Order omitted from publication.]

[6] See *Greeson v. Sherman*, 265 F.Supp. 340 (W.D. Va. 1967).

[7] This was done as a matter of courtesy. I was not under any obligation to do so and could have returned the application to counsel for the Respondent.

[8] The pertinent regulations were published in the Federal Register over a year earlier, on September 30, 1981.